

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN BASEBAND
PROCESSOR CHIPS AND
CHIPSETS, TRANSMITTER AND
RECEIVER (RADIO) CHIPS,
POWER CONTROL CHIPS, AND
PRODUCTS CONTAINING
SAME, INCLUDING CELLULAR
TELEPHONE HANDSETS**

Inv. No. 337-TA-543

COMMISSION OPINION DENYING MOTIONS FOR STAY

The Commission instituted this investigation on June 21, 2005, under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, based on a complaint filed by Broadcom Corporation of Irvine, California ("Broadcom"), alleging a violation of section 337 in the importation, sale for importation, and sale within the United States after importation of certain baseband processor chips and chipsets, transmitter and receiver (radio) chips, power control chips, and products containing same, including cellular telephone handsets by reason of infringement of certain claims of, *inter alia*, U.S. Patent No. 6,374,311; 6,714,983 ("the '983 patent"). 70 *Fed. Reg.* 35707 (June 21, 2005). The complainant named Qualcomm Incorporated of San Diego, California ("Qualcomm") as the only respondent.

On October 19, 2006, the presiding administrative law judge (“ALJ”) issued an Initial Determination on Violation of Section 337 and a Recommended Determination on Remedy and Bond (collectively, “ID”), finding a violation of section 337. On December 8, 2006, the Commission issued a notice of its decision to review and modify in part the ALJ’s final ID. The modification made by the Commission did not affect the finding of violation. After consideration of the written submissions and of the testimony at a public hearing by the parties to the investigation, interested government agencies, and other interested persons on the issues of remedy, the public interest, and bonding, the Commission on June 7, 2007, issued its determinations on those issues. The Commission determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of baseband processor chips or chipsets, including chips or chipsets incorporated into circuit board modules and carriers, manufactured abroad by or on behalf of Qualcomm or any of its affiliated companies, parents, subsidiaries, contractors, or other related business entities, or their successors or assigns, that are programmed to enable the power saving features covered by claims 1, 4, 8, 9, or 11 of the ‘983 patent, as well as handheld wireless communications devices, including cellular telephone handsets and PDAs, containing Qualcomm baseband processor chips or chipsets that are programmed to enable the power saving features covered by claims 1, 4, 8, 9, or 11 of the ‘983 patent. The Commission limited exclusion order does not apply to computer data

cards. Also exempted from the Commission limited exclusion order are handheld wireless communications devices that are of the same models as handheld wireless communications devices that were being imported into the United States for sale to the general public on or before the date of the Commission limited exclusion order. The Commission determined that the exempted models must be identifiable by specific and verifiable model numbers, denoting model-specific product specifications, features, and functions. Importers will be able to certify to the Bureau of Customs and Border Protection that their products are exempted. This exemption will not apply to handheld wireless communications devices that differ in terms of model number, product specifications, features, or functions from handheld wireless communications devices that were being imported into the United States for sale to the general public on or before the date of the Commission limited exclusion order.

The Commission also determined to issue a cease and desist order that prevents Qualcomm from engaging in certain activities in the United States related to the infringing chips.

Subsequently, intervenor LG Electronics Mobilecomm U.S.A., Inc. ("LGEMU"), intervenor Cellco Partnership d/b/a Verizon Wireless ("Verizon"), and respondent Qualcomm each filed with the U.S. Court of Appeals for the Federal Circuit (the Court) a petition for judicial review accompanied by a motion for a stay, pending appeal, of the limited exclusion order issued by the

Commission (Qualcomm also moved for a stay of a cease and desist order issued by the Commission). On June 11, 2007, the Court denied LGEMU's motion without prejudice to renewal if it complies with Fed. R. App. P. Rule 18(a)(1). The Court also ordered that the stay motions filed with the Court by Verizon and Qualcomm would be held in abeyance for ten calendar days, to provide the Commission an opportunity to rule on motions to stay pending before the Commission. Court's Order at 2.

On June 13, 2007, the Commission issued an Order in which the Commission ordered, *inter alia*, that any party to this investigation that has not previously filed a timely motion for administrative stay (*i.e.*, a motion filed subsequent to issuance of the Commission remedial orders) and that wishes to file such motion, must do so no later than 1 p.m. on Thursday, June 14, 2007, and that any party to this investigation that does not file a motion for stay with the Commission may file one combined responsive pleading no later than 1 p.m. on Monday, June 18, 2007.

Respondent Qualcomm, intervenors Motorola, Inc. ("Motorola"), Kyocera Wireless Corp. ("Kyocera"), Samsung Electronics Co., Ltd. ("Samsung"), Sprint Nextel Corporation ("Sprint"), Verizon, LGEMU, and non-parties AT&T Mobility ("ATTM") and T-Mobile USA, Incorporated ("T-Mobile") (collectively, "Movants") have moved for a stay of the Commission limited exclusion order

pending appeal to the Federal Circuit.¹ The Commission investigative attorney (“IA”) and complainant Broadcom oppose movants’ motions.

The Commission has previously held that section 705 of the Administrative Procedure Act (“APA”) (5 U.S.C. § 705) provides the requisite authority to stay the effective date of its orders. *Certain Agricultural Tractors Under 50 Power Take-Off Horsepower* (“Tractors”), Inv. No. 337-TA-380, Comm’n Opinion at 9-10 (Apr. 24, 1997). In determining whether to grant a motion for stay under section 705 of the APA, the Commission has applied the four-prong test used by courts to determine whether to grant a preliminary injunction. *Id.*; *Certain EPROM, EEPROM, Flash Memory, and Flash Microcontroller Semiconductor Devices and Products Containing Same* (“EPROMs”), Inv. No. 337-TA-395, Comm’n Opinion at 88-90, USITC Pub. No. 3392 (February 2001); *see Cuomo v. U.S. Nuclear Regulatory Comm’n*, 772 F.2d 972 (D.C. Cir. 1985); *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petrol. Jobbers Ass’n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

The four-prong test is also applied by the Federal Circuit in considering whether to issue a stay pending appeal and requires that the movant demonstrate: (1) a likelihood of success on the merits of the appeal; (2) irreparable harm to the movant absent a stay; (3) that issuance of a stay would not substantially harm

¹ Qualcomm also seeks a stay of the Commission cease and desist order.

other parties; and (4) that the public interest favors a stay. *See Standard Havens Prods. Inc. v. Gencor Indus. Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990); *Holiday Tours*, 559 F.2d at 843. However, the Commission need not conclude that its own determination is likely to be overturned on appeal, but may find the first prong satisfied if the Commission has ruled on “an admittedly difficult legal question.” *Holiday Tours*, 559 F.2d at 844-45.

Having examined movants’ motions, complainant’s opposition, and the IA’s response, the Commission has determined that the stay of the Commission remedial orders is not warranted because the movants have failed to satisfy the four-prong test under *Standard Havens* and *Holiday Tours*. *See also Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, Inv. No. 337-TA-380, Comm’n Op. (Apr. 24, 1997).²

² Chairman Pearson and Commissioner Pinkert have determined that stay of the Commission remedial orders is warranted pursuant to the standard set forth in *Standard Havens* and *Holiday Tours*. Accordingly, Chairman Pearson and Commissioner Pinkert would order a stay of the Commission remedial orders pending appeal and would extend the bonding period until the stay is lifted.

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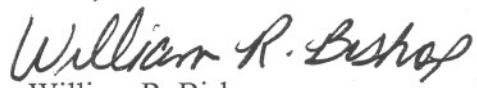
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ORDER

Upon consideration of the motion by Qualcomm Inc. for a stay of the Commission's limited exclusion order and cease and desist order, and the motions by LG Electronics Mobilecomm U.S.A., Inc., Cellco Partnership d/b/a Verizon Wireless, Motorola, Inc., Kyocera Wireless Corp., Samsung Electronics Co., Ltd., Sprint Nextel Corporation, AT&T Mobility, and T-Mobile USA, Inc. for a stay of the Commission's limited exclusion order, and of the responses to these motions filed by Broadcom Corp. and the Commission investigative attorney, the Commission hereby **ORDERS** that:

1. Movants' motions for a stay of the Commission's limited exclusion order and cease and desist order pending appeal are denied.
2. The Secretary shall serve copies of this Order upon each party of record in this investigation and any other party that filed a motion for stay.

By Order of the Commission.

A handwritten signature in black ink, reading "William R. Bishop". The signature is written in a cursive style with a large, stylized 'W' and 'B'.

William R. Bishop
Acting Secretary to the Commission

Issued: June 21, 2007